BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

No lien arose under New York law prior to the commencement of reorganization proceedings.

This conclusion is supported by:

(a) the Report of the Joint Legislative Committee (N. Y. Leg. Doc. 1926, Vol. 17, No. 94).

(b) the provision of Section 4 of Chapter 233 of the Laws of 1926, which conditioned the existence of a lien upon the event of the failure or refusal of the railroad corporation to pay the amounts due.

(c) the circumstance that in respect of street railroad companies, the Legislature accorded an immediate lien to take effect upon the railway company's election to pay in installments (Section 8297 of the Unconsolidated Laws, New York Laws of 1890, Chap. 565, Sec. 119, as amended).

(d) the provisions of Chapter 678 of the Laws of 1928, as amended, which impose the requirements of certification, apportionment, assessment and levy in addition to the requirement of default as conditions precedent to the existence of a lien.

POINT II

No lien could be acquired by the State after reorganization proceedings were instituted.

It is well settled that only valid liens existing at the time of the commencement of bankruptcy proceedings are

preserved. The general rule in bankruptcy is that the filing of the petition freezes the rights of all parties interested in the bankrupt estate; that upon adjudication of bankruptcy no lien may thereafter be created upon the property of the debtor, the title thereto having vested in the trustee as of the date of the filing of the petition. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734 (1931); *Gross* v. *Irving Trust Co.*, 289 U. S. 342 (1933); *Lockhart* v. *Garden City Bank & Trust Company*, (C.C.A. 2d 1940), 116 F. (2) 658. The general rule is made applicable to Section 77 proceedings by Section 77(l) of the Bankruptcy Act which provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The Chandler Act of 1938 expressly made the date of the filing of the petition the controlling date by providing in Section 70(a) that "The trustee of the estate * * * upon his * * * appointment and qualification, shall * * * be vested by operation of law with the title of the bankrupt as of the date of the * * * original petition * * *". Finletter, at pages 154 and 155 of his treatise, *Law of Bankruptcy Reorganization* (1939) states that this provision is applicable under Section 77. Before the Chandler Act codified the preexisting law in this respect Finletter said "Section 77(l) leaves no doubt but

that the date of the filing of the petition fixes the estate." *Principles of Corporate Reorganization* (1937), 161-162.

After title passes from the corporate debtor to the Trustee it is obviously impossible for a new claim to be acquired against the debtor or the debtor's property. It is therefore significant that "creditors" are defined in subdivision (b) of Section 77 as holders of claims "against the debtor or its property," not against the trustee or the property held by him.

This fixing of the estate on the date of filing the original petition, which in this case was May 20, 1937, is not inconsistent with any other provision of Section 77. Rights of creditors must be fixed on some certain date; and Congress has chosen the date of filing.

Lowden v. *Northwestern National Bank & Trust Co.*, 84 F. (2d) 847 (C.C.A. 8th, 1936), cert. den. 299 U. S. 583 (1936);

In re Chicago & N. W. Ry. Co., 18 F. Supp. 932 (N. D. Ill. 1936);

In re Kent Refining Co., 20 F. Supp. 661 (W. D. Mich. 1937);

City of New Orleans v. *Harrell*, 134 F. 2d 399 (C.C.A. 5th, 1943).

POINT III

Section 67(b) of the Bankruptcy Act does not support the State's claim to a lien.

The District Court properly sustained the objections to the State's claims insofar as they assert a right to a lien under Section 67(b) of the Bankruptcy Act. The Circuit

Court of Appeals erred in holding that Section 67(b) is applicable to Section 77 proceedings and that the State of New York is entitled to a lien upon the mortaged property of the Debtor. The grounds for refusing to recognize the establishment of a lien under that section are twofold and may be stated briefly as follows:

(1) The applicability of Section 67(b) is limited by its terms to proceedings in ordinary bankruptcy or those under Chapters X, XI, XII, or XIII of the Bankruptcy Act. The omission of any reference to Chapter VIII, of which Section 77 is a part, indicates that Section 67(b) is inapplicable to proceedings brought thereunder. Had Congress intended to make Section 67(b) applicable to Section 77 proceedings "it would have been very easy to say so." (*In re Columbia Tobacco Co.*, 121 F. (2d) 641 (C.C.A. 2d, 1941).) Thus, Section 53 of the Bankruptcy Act refers specifically not only to Chapters X, XI, XII and XIII, but also to Chapters VIII and IX, indicating that had Congress so intended in this instance it would have said so.

(2) Section 67(b) limits the class of statutory liens which may be perfected thereunder to those which "*arise* but are not perfected before bankruptcy." No lien arose prior to the commencement of these proceedings because no default occurred before the filing of the petition, a condition precedent to the creation of a lien under the New York statute. Under these circumstances it is clear that Section 67(b), even if applicable to Section 77 proceedings, does not permit the acquisition of a lien by the State of New York after the institution of reorganization proceedings.

POINT IV

The holding of the Circuit Court of Appeals that the claims are payable as taxes is erroneous.

Such holding of the Circuit Court of Appeals is erroneous because contrary to the Law of the State of New York as announced in the case of *Central Savings Bank* v. *City of New York*, 279 N. Y. 266 (December 6, 1938). The case cited indicates the law of New York to be that a charge upon real property is not a tax merely because it is labeled in the statute as an "assessment"; that a tax is a forced charge levied by the State upon persons or property; that it operates "in invitum" and is in no way dependent upon the will of contract, express or implied, of the persons taxed; that the Legislature cannot create a tax by calling it an assessment when it has not the elements or substance of a tax; and that the purported "assessment" involved in the case cited could not be a tax because the charges upon the real estate were optional with the owner (pp. 280 and 281).

So, with respect to the grade crossing elimination claims, the charges were similarly optional with the owner (the Debtor). Although the Debtor could not have ceased to operate (and in this respect is in a different position from the owner of a tenement house who could devote it to another use and thereby avoid the necessity of making the alterations and improvements directed by the Department of Housing and Buildings), yet the Debtor could have avoided certification, apportionment, assessment and levy, and avoided any debt to the State by borrowing the funds from someone other than the State, or by paying the charges as they accrued, out of its treasury. The Debtor

was under no obligation imposed by the statute to borrow from the State the funds necessary to pay the Debtor's share of the cost of eliminating the grade crossings. The New York Court of Appeals also stated that such an act constitutes a taking of property without due process of law and impairs the obligation of the contract with the mortgagor contrary to the provisions of the state and federal constitution (p. 275).

POINT V

A governmental preference is not involved.

The State acted only as a lender and not in a governmental capacity when it advanced the monies, therefore, it should not receive any preference usually granted to a government when acting in its sovereign capacity.

CONCLUSION

The writ of certiorari should be granted as prayed for.

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Respectfully submitted,

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